In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4049

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation,
Plaintiff in Error

vs.

JAMES ROMAN, Administrator of the Estate of Edgar Roman, Deceased, *Defendant in Error*

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Reply Brief of Plaintiff in Error

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Because of the limited time allotted to plaintiff in error in which to present its contentions to the court by way of oral argument, and because of the importance of certain legal principles herein involved, plaintiff in error desires to submit a reply brief herein for the purpose of discussing certain

cases submitted by the defendant in error. For convenience in this brief, the parties will be referred to as designated in the court below.

The leading case cited by the plaintiff in support of his argument is that of *Roth v. Union Depot Company*, 13 Wash. 525. Even a cursory examination of the facts in said case and the principles of law laid down therein, will readily show that it does not support plaintiff's contentions, but on the contrary it upholds our view of the law of the state of Washington in cases of the same category as the ones at bar. In the first place, in the Roth case the place of accident was located in the streets of the city of Spokane, in the most populous part of the city, a place used, as one witness put it, "they used it just about the same as you would a sidewalk." There was also a high bluff with a sharp curve down grade near the place of accident, and the cars crossing the same were turned loose and allowed to go down the track around the curve, gathering great momentum as they proceeded. Furthermore, the cars were moving on both tracks, causing great confusion to the boy on the track, and in order to avoid one, he stepped in front of the other. It can readily be seen that the facts of the case are not at all analogous to those in the

cases at bar, where a long string of cars coupled together were only moved two feet by the closing of a couple of gaps in said string. In rendering his decision in said case, Judge Dunbar, on page 566 thereof, expressed his views to the effect that there was gross negligence on the part of the defendant; but no one reading the case could for one moment gather therefrom that the court would have held the defendant liable had there been a long string of cars on the track coupled together and caused to move backward a couple of feet by the coupling up of the engine, even at a place as extensively used in a populous part of the city as that shown in the Roth case. Even in that case it may be of interest to know that the Chief Justice rendered a strong dissenting opinion.

In the case of *Steele v. N. P. Ry.*, 21 Wash. 293, the plaintiff was injured at a public crossing, recognized as such by the defendant, in the city of Yakima, by a car making a flying switch, the car being on one track and the engine on the other, which tended to confuse anyone using the crossing. It is obvious that such a case is not at all applicable to the ones at bar.

Eskilden v. Seattle, 29 Wash. 583, is as far away in fact and principles from the cases at bar as are

the other cases cited in plaintiff's brief. The boy was injured from having his foot caught in a defective street of the defendant.

McConkey v. O. W. R. & N., 35 Wash. 55, is another case bearing out our theory of the law in the cases at bar, and we cannot but wonder why the same was cited by the plaintiff. McConkey was traveling over a trestle very frequently used by pedestrians, when he fell through a hole in same. It was conceded that he was a licensee, but nevertheless the court sustained a demurrer to the complaint. In speaking of the Roth case, and others cited by plaintiff, the court said:

"Wanton negligence was the controlling question in the case."

The court further said on pages 59 and 60:

"Assuming, however, that appellant was a licensee by reason of the fact that respondent had never actually prohibited him and others from traveling there, what new obligation did that fact create on the part of the respondent under the peculiar facts of this case? * * * Appellant was certainly not a licensee in the sense of being invited to cross the bridge. For his own benefit only, he assumed to cross because the privilege had not been denied. Under such circumstances, we think he must be held to have taken the situation as he found it. * * * We, therefore, think the com-

plaint, at most, shows that appellant was no more than a bare licensee, and in such case respondent owed him no duty, except to avoid willful, wrong and wanton carelessness and neglect. In our view, the complaint shows no such neglect to duty, and we believed it would be so viewed in the minds of all reasonable jurors."

Curtis v. O. W. R. & N., 36 Wash. 55, was a case in which cattle were killed while being driven over the defendant's tracks at a place where the defendant had built and maintained a grade crossing. The court found that the action of the defendant was wanton and willful. Thus it will be seen there was nothing in said case to support the contentions of the plaintiff herein.

Dotta v. N. P. Ry. Co., 36 Wash. 512, clearly sustains our contention as to what the law in the state of Washington is concerning a situation such as we find in the cases at bar. The plaintiff was injured while using a trestle as a footway in the city of Seattle, which was often used as a convenient way for pedestrians to industrial plants along the waterfront. It was held in said case that the use of the trestle was not forbidden by the defendant, but it was not encouraged by the manner of its construction. Judgment of non-suit was held proper, as the plaintiff was a trespasser, or at most a bare

licensee, to whom the defendant owed no duty except that of refraining from wanton or wilful injury. So in the cases at bar, the manner of construction of the grade at track No. 12 was such that the use of same was not encouraged. The grade was six or seven feet high rising abruptly from the ditch along the right of way (R. pp. 65, 71, 100). One of plaintiff's witnesses, a grown man, testified that there was quite an incline, that it was hard to get a wheelbarrow across the tracks, and that he always carried his wood over the track (R. p. 100). All the witnesses admitted there was a fence up along the right of way at various times, which positively negatived any encouragement on the part of the defendant for the using of the track by pedestrians, and further negatived any idea of invitation, express or implied, on the part of the defendant.

Again, we are led to wonder why the plaintiff should have cited the case of *Baker v. Tacoma & E. Ry.*, 44 Wash. 575. In that case an employee was killed at a place where the railroad tracks crossed a public street in the City of Tacoma. It was held that he could not recover. It is very evident that such case does not tend to sustain the contentions of the plaintiff in any way.

In *Vinette v. N. P. Ry.*, 47 Wash. 320, a child was killed by backing cars on defendant's switch track, and it was held that the parents could not recover. The court held that the railway company was not negligent, and even though people were in the habit of crossing the track at that place, there was no duty imposed upon the defendant to look out for them. It was also held that the plaintiffs could not make others bear the consequence of their own neglect. How the plaintiff in the cases at bar can absorb any comfort from the above case to support his theory, is more than we can fathom.

Grant v. O. W. R. & N., 54 Wash. 678, was a case in which a woman was injured by cars at a public crossing where no warning was given of the approach of the train. She was forced on the crossing involuntarily by a team of horses which had become frightened. Of course, it was the duty of the defendant to give proper signals and use due care at a public crossing. Such a case is not applicable to the ones at bar.

Gregg v. King County, 80 Wash. 204, was a case in which a boy was injured at a dock owned, controlled and operated by the defendant. He could not have been a trespasser at a public dock where

everybody was invited. It was also held in that action that imputed negligence would not apply, because the action was brought by the child. The case is not in point.

In the case of *Imler v. N. P. Ry.* 89 Wash. 527, a licensee was walking along the track and was killed by a train running against traffic, that is, a northbound train was running on a southbound track. It was held that the plaintiff could not recover, and that a judgment of non-suit at the close of plaintiff's case in the trial court was proper. Thus it will be seen that said case, if at all applicable to the ones at bar, sustains the defendant's contentions rather than those of the plaintiff.

In *Scharf v. Spokane I. E. Ry.*, 92 Wash. 561, the rule was well established that a naked licensee using the defendant's switch track, could not recover for injury sustained, nor could his personal representative or heirs recover for his death from such injuries, unless the negligence of the defendant was so gross as to amount to wilfulness or wanton recklessness On page 565 of said case, the court in laying down the very rule which is the law of the state of Washington established beyond question in cases of this nature, said:

"The present case is governed by the well-settled rule that a naked licensee or trespasser who is injured upon the tracks or right of way of a railway company can recover for such negligence only as arises from wantonness or wilfulness on the part of the railway or its employees. As it is expressed in 3 Elliott, Railroads (2d ed.), § 1250:

" 'The better rule is that the licensee take his license subject to its concomitant perils, and the licensor, as a general rule, owes him no duty except to refrain from wilfully or wantonly injuring him, or to exercise ordinary and reasonable care after discovering him to be in peril.'

"In 2 Thompson, Negligence (2d ed.), §§ 1713, 1715, it is said:

" 'This doctrine is that where a trespasser or bare licensee exposes himself to the risk of being run over upon a railway track or in a railway yard, and is killed or injured, there can be no recovery against the railway company unless it is made to appear that the accident was the result of wilful misconduct, or of negligence or recklessness so gross as to amount, in theory of law, to wilful misconduct.'

" 'It seems entirely plain, from what has preceded, that the failure of the railway company to take special precautions beforehand in anticipation of the presence of trespassers upon the tracks, or in its yards—as by stationing a lookout or giving danger signals, or running at a diminished rate of speed, or using care to discover trespassers in positions of danger—can not be ascribed to it as gross,

reckless, wanton or wilful negligence within the meaning of the rule under consideration, since the great mass of holdings refuses to impute simple negligence by reason of such acts.' "

"In *Kroeger v. Grays Harbor Construction Co.*, 83 Wash. 68, 145 Pac. 63, we say:

" 'The rule is that a defendant owes no duty of actual care, while a duty of vigilance or the highest degree of care is put upon one who, for his own purposes, goes upon the premises of another and puts himself in a place of danger.'

"See, also, *Illinois Central R. Co. v. Eicher*, 202 Ill. 556, 67 N. E. 376; *Cannon v. Cleveland, C. C. & St. L. R. Co.* 157 Ind. 682, 62 N. E. 8; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 64 Fed. 823, 99 Fed. 369; *Huff v. Chesapeake & O. O. R. Co.*, 48 W. Va. 45, 35 S. E. 866; *Spicer v. Chesapeake & O. R. Co.*, 34 W. Va. 514; 12 S. E. 553, 11 L. R. A. 385."

The law as announced in the last case and in the ones cited in our opening brief establishes beyond question that the plaintiff should have been nonsuited, and that the defendant should have received a judgment of dismissal or a directed verdict in the cases at bar.

We have taken up the Washington cases cited by defendant in his brief, and have briefly stated the facts and circumstances in each, and in no case cited have the contentions and theories of the plain-

tiff been upheld. Counsel says that in the Scharf case there was a path on either side of the track upon which the decedent might have traveled in safety. So there was in the cases at bar.

On pages 93 and 94 of the transcript of record in these cases, we find the testimony of Charles Roman, who was with the decedent at the time of the accident, upon this point. He admitted there was a path along either side of the track.

"Q. You didn't have to cross the track right at that place where you crossed it, did you?

"A. No.

"Q. But you and Edgar went just to the end, and as soon as you got to the end of the box-car you turned your wheelbarrow around and tried to get across.

"A. No.

"Q. Didn't you try to get across there?

"A. In just about a minute after we got there. I looked and listened before.

"Q. Of course, you stopped and looked and listened; but you didn't go very far from the end of the car before you started to go across?

"A. No.

"Q. When the cars bumped they didn't go very far, did they?

"A. No.

"Q. Just two or three feet?

"A. Just enough to run on his legs and back again.

"Q. And if you and Edgar had been down a couple of feet from there that car would not have got him?

"MR. BROWN: I object to that.

"THE COURT: Objection overruled.

"A. No."

In fact, all of the testimony of Charles Roman, the only eye witness to the accident, establishes beyond a doubt that defendant should have received a judgment of dismissal or a directed verdict in these cases. There was nothing left for the jury in said cases. The fact that under the law of the State of Washington the decedent was beyond peradventure of a doubt, a bare or naked licensee, was sufficient to entitle the defendant to a non-suit. Coupled with that conclusive defense, were the further facts of the gross negligence of the decedent and that of his parents. We can not find nor conceive of a case of contributory negligence so gross or so notorious, and a reading of the testimony of the father, mother and the young son, we feel sure

will convince the court that this case should never have been allowed to be submitted to a jury. From the example set for the decedent by his parents when accompanying him, we know that he did not exercise any degree of care in attempting to cross the track. Counsel lays stress upon the fact that the boys stopped, looked and listened. Of what benefit to them would that have been when the boy testifies they could not see the end of the string of cars? Even a child much younger than the decedent, should know, under those circumstances that it would be the utmost recklessness and folly to attempt to cross immediately behind the last car, when they had at least three hundred feet of clear track behind them. To permit any defendant to be mulcted in damages under such a state of facts, would be the grossest injustice. So upon either of two grounds, plaintiff should have been non-suited in these cases, and we submit that the court erred in not granting our motions.

It was to call the court's attention to the Washington cases cited by the plaintiff in his brief and to show that those cases among them applicable to the facts of the case at bar, are contrary to the contentions of the plaintiff, and that they support

our view of the law of the State of Washington, that this brief is submitted.

The inapplicability of the arguments advanced by counsel for the plaintiff on the other questions discussed in their brief, is so patent and obvious, that we will not take up the time of the court in discussing them. However, we do desire to call the court's attention to one case decided by this court and cited by the plaintiff as being adverse to our contention that the plaintiff had no capacity to sue. The case referred to is *Puget Sound Traction, Light & Power Company v. Frescoln*, 245 Fed. 301. In said case, the respondent commenced the action; before trial he died, and his wife as administratrix *and in her own right*, under section 194 Rem. & Bal. Code, was substituted as party plaintiff. Doubtless if she had not sued in her own right, the question of her capacity to sue would have been raised. She afterwards sued as the widow of the deceased under section 183, Rem. & Bal. Code, which she had a right to do, but said section was amended by the laws of 1917, which now provide that such actions must be maintained by the personal representative. Thus it will be readily seen that all this court decided in that case was that an action under section 194 was not a bar to an action under section 183.

However, the question of the proper parties plaintiff in cases of this nature has now been definitely settled by the case of *Howe v. Whitman County*, 120 Wash. 247, cited and quoted in our opening brief, that actions must be brought in the representative capacity under section 183 and in personal capacity under section 194, and it is unnecessary to further discuss it.

Respectfully submitted,

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